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Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, prepared by the Secretariat

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I. Introduction

1. At its sixty-eighth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 20 September 2013, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 17th to 26th and 29th meetings, from 28 to 30 October and 1, 4, 5 and 15 November 2013. The Committee considered the item in three parts. The Chair of the International Law Commission at its sixty-fifth session introduced the report of the Commission on the work of that session as follows: chapters I to V and XII at the 17th meeting, on 28 October, and chapters VI to XI at the 23rd meeting, on 4 November. At the 19th meeting, on 30 October, the Chair also introduced chapter IV of the report of the Commission on the work of its sixty-third session, on the topic "Reservations to treaties". At its 29th meeting, on 15 November, the Sixth Committee adopted draft resolution A/C.6/68/L.23, entitled "Reservations to treaties", and draft resolution A/C.6/68/L.24, entitled "Report of the International Law Commission on the work of its sixty-fifth session". The two draft resolutions were adopted by the Assembly at its 68th plenary meeting, on 16 December 2013, as resolutions 68/111 and 68/112, respectively.

3. By paragraph 34 of its resolution 68/112, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-eighth session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary. It consists of two parts. The first contains 9 sections: A. Subsequent agreements and subsequent practice in relation to the interpretation of treaties; B. Immunity of State officials from foreign criminal jurisdiction; C. Protection of persons in the event of disasters; D. Formation and evidence of customary international law; E. Provisional application of treaties; F. Protection of the environment in relation to armed conflicts; G. Obligation to extradite or prosecute (*aut dedere aut judicare*); H. Most-Favoured-Nation clause; and I. Other decisions and conclusions of the Commission. The second part contains a summary of the debate on "Reservations to treaties".

II. Topical summary: report of the International Law Commission on the work of its sixty-fifth session

A. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

1. General comments

4. Some delegations noted with appreciation the change in the format of consideration of the topic and its reorientation. Delegations generally welcomed the draft conclusions, and commentaries thereto, adopted by the Commission, some of them putting emphasis on the importance of clarifying the rules of treaty interpretation or the limits of subsequent agreements and practice as interpretive tools. The view was expressed that the draft conclusions should be more precise and normative. The Commission was encouraged by some delegations to consider, in its

future work, article 33 of the Vienna Convention on the Law of Treaties, the procedural requirements for the adoption of interpretative resolutions and the role of subsequent practice in treaty modification.

2. Draft conclusion 1. General rule and means of treaty interpretation

5. Delegations welcomed the emphasis on preserving the established methods of treaty interpretation under articles 31 and 32 of the Vienna Convention, and situating subsequent agreements and subsequent practice in that framework, without altering these rules. Several delegations encouraged the Commission to go beyond distilling existing rules. Some delegations agreed that articles 31 and 32 reflected customary international law, while the view was expressed questioning such a conclusion. Similarly, it was noted by some delegations that article 33 reflected customary international law, while a point was made disagreeing with such an assertion. A number of delegations supported the reference, in the draft conclusion, to a single combined operation of treaty interpretation, with no hierarchy among the means of interpretation identified in article 31. It was noted that the nature of the treaty at issue may be a relevant consideration, while the view was expressed that this could weaken the unity of the approach to treaty interpretation.

3. Draft conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation

6. Delegations welcomed the formulation of draft conclusion 2. The view was expressed that subsequent agreements and subsequent practice were not binding means of interpretation, with a point, however, being made that the former should be considered binding for States parties. Some delegations expressed doubts as to whether subsequent agreements or subsequent practice could be considered "objective evidence" of the parties' understanding as to the meaning of a treaty. Considering that the term "authentic" has a particular technical meaning relating to language versions of a treaty, it was suggested to use "accepted" or "valid" as alternatives. As to the commentary, the distinction between the term "authentic means of interpretation" and the term "authentic interpretation" was questioned and it was suggested to refer to additional examples of State practice therein.

4. Draft conclusion 3. Interpretation of treaty terms as capable of evolving over time

7. Some delegations welcomed the formulation of draft conclusion 3, although a comment was made that it was too general in nature. The Commission was praised for not taking a position on whether a contemporaneous or evolutive interpretation is preferred, while some delegations advised caution regarding evolutive interpretations. The view was expressed that the nature of a treaty may be relevant in determining whether it is capable of evolving over time. A number of delegations expressed concern regarding the term "presumed intent", indicating that intent, in this context, is to be discerned by applying articles 31 and 32, not through an independent inquiry. A suggestion was made encouraging the Commission to explore the possibility that it is not the meaning of a given term but rather the intention of the parties that may evolve over time.

5. Draft conclusion 4. Definition of subsequent agreement and subsequent practice

8. Some delegations welcomed the definitions contained in draft conclusion 4, in particular the distinction established between "subsequent practice" under article 31 and "other subsequent practice". The view was expressed that a "subsequent agreement" did not have to be a treaty in the sense of the Vienna Convention, but could be, inter alia, informal agreements, non-binding arrangements or interpretative declarations by treaty bodies. It was also noted that a "subsequent agreement" should have binding effect in order to be taken into account for that purpose. It was pointed out that "subsequent practice" should not be defined as "conduct", as State conduct may be variable and contradictory, and suggested that the definition should be modified to reflect that only concordant and consistent State practice can establish parties' interpretation. Moreover, the view was advanced that the subsequent practice of less than all parties to a treaty could serve only as a supplementary means of interpretation under the restrictive conditions of article 32 of the Vienna Convention. The Commission was also encouraged to elaborate on the relationship between subsequent practice and other supplementary means of interpretation under article 32.

6. Draft conclusion 5. Attribution of subsequent practice

9. Some delegations requested the Commission to study further the practice of States organs at the judicial and lower levels, and requested clarification of the distinction drawn between lower and higher State organs. It has also been noted that, for the purpose of this topic, conduct should only be attributed to a State when it was undertaken or accepted by the State organs responsible for the application of a treaty. Some delegations acknowledged that the work and conduct of non-State actors, especially judicial bodies, may be taken into account in the interpretation of certain treaties in order to reveal the subsequent practice of States parties. Other delegations urged the Commission to clarify the relevance of the conduct of non-State actors, international organizations in particular.

B. Immunity of State officials from foreign criminal jurisdiction

1. General comments

10. The progress of the Commission on the topic thus far, building upon its work in prior years, was generally welcomed, with some delegations noting, in particular, the provisional adoption of three draft articles on the subject. It was recognized that the topic was important, of practical significance and difficult. The lack of public records regarding the considerations that States take into account in whether or not to defer criminal prosecution, only made the task more challenging.

11. Several delegations reiterated the need to strike a balance between fighting impunity and maintaining harmonious relations between States, based on the respect for sovereign equality of all States. Some other delegations stressed the procedural nature of immunity as a bar to criminal proceedings, pointing out that the underlying substantive individual criminal responsibility remained unaffected; and as such, immunity should not be viewed as a loophole in the fight against impunity.

12. In its consideration of the topic, some delegations maintained that the Commission ought to take a clear, restrictive, value-laden and ontological approach.

The point was made, however, that the proposed analysis of values of international law would only complicate the consideration of the topic. Some delegations emphasized the importance of proceeding on the basis of a clear distinction between the *lex lata* and the *lex ferenda*, with some also observing that the latter should be resorted to with extreme caution. The Commission was also urged by some other delegations not to be overly cautious; as appropriate, it should not hesitate to embark on an exercise in the progressive development of international law.

13. Some delegations acknowledged the relevance of proceeding on the basis of the distinction between immunity *ratione personae* and immunity *ratione materiae*, while also stressing similarities, noting, in particular, that some considerations that relate to immunity *ratione personae* would be relevant in respect of immunity *ratione materiae*.

2. Draft article 1. Scope of the present draft articles

14. The approach of draft article 1 was generally supported. Some delegations underlined the focus of the topic on criminal jurisdiction as opposed to civil jurisdiction, pointing out that the commentary should clarify that the draft articles had no bearing on any immunity that may exist with respect to civil jurisdiction.

15. It was also highlighted that there were definitional considerations that needed to be addressed, including such terms, as "State official" and "criminal jurisdiction". For the former, there was a need for the Commission to settle on whether the term "official" was appropriate for the draft articles; the suggestion was made in that regard to use instead "representative of the State acting in that capacity". As regards "criminal jurisdiction", some delegations, noting the absence of definition in previous codification efforts, doubted the need for such definition. It was also observed that it was unclear why, as the commentary seemed to suggest, the term was limited to a set of acts linked to judicial processes, as there was practice that the executive branch of government, including administrative authorities, exercised constraining acts of authority without the prior involvement of the judiciary.

16. Some delegations shared the concerns expressed in the Commission regarding the necessity and usefulness of defining certain terms, such as "immunity from foreign criminal jurisdiction", "immunity *ratione personae*" and "immunity *ratione materiae*". Some other delegations, however, considered it useful to have those terms defined.

17. While agreeing that the draft articles related only to immunity from the criminal jurisdiction of another State, it was noted by some delegations that it might be appropriate for the Commission to analyse considerations of cooperation with international criminal courts and tribunals in relation, in particular, to national legal processes, such as effectuating an arrest and the collection of evidence, and situations involving individuals of third States.

18. Since a State was conceivably not precluded from conducting preliminary investigative steps to ascertain the facts of a case, it was also suggested that the precise moment at which immunity would be implicated might require elucidation by the Commission.

19. It was understood by some delegations that paragraph 2 covered special rules under both customary law and treaty law. Its formulation was, however, found confusing as to its scope, some delegations viewing it as not intended to be

exhaustive, whereas for others, that aspect was unclear. It was also suggested that it might be useful for the Commission to describe further how each of the special regimes would apply in contrast to the draft articles. For instance, it was not clear whether the "without prejudice" clause was automatic and exclusive. In this connection, it was not discernible whether the special rules were applicable only in situations where such rules were more favourable than the immunity under the present draft articles or whether they also applied to situations where they were less favourable. Indeed, it was questioned whether there might there be certain circumstances in which the draft articles would conceivably also apply.

20. It was also suggested that paragraph 2 should explicitly refer to permanent missions to international organizations and delegations participating in international conferences. Some delegations expressed support for the inclusion of persons connected with military forces of a State. At the same time, concern was expressed as to the specificity of the phrase "persons connected with", noting that there were varied legal regimes applicable in such cases, requiring a comprehensive consideration of the matter.

21. It was also noted that there was need for further clarity in respect of cases where a State, basing itself on international law, unilaterally confers immunities. Such an omission from paragraph 2 was, however, supported by some delegations.

22. Arising from the notion of the "State", the suggestion was made that it might be useful for the Commission to address, in relation to scope, aspects concerning recognition, as well as the position of non-self-governing territories.

3. Draft article 3. Persons enjoying immunity *ratione personae*

23. The general thrust of draft article 3 was considered favourably. However, comments were made on a number of aspects, pointing out, in particular, how crucial it was for the whole exercise for the Commission to ground its propositions in the practice of States. Some delegations agreed with the limitation of immunity *ratione personae* to heads of State, heads of Government and ministers for foreign affairs. The possible extension of immunity *ratione personae* to other high-ranking officials was viewed as having no sufficient basis in the practice. It was asserted that such officials were appropriately treated as members of special missions. While acknowledging that only a small circle of high-ranking officials enjoyed immunity *ratione personae*, some other delegations doubted that the limitation as proposed was supported in the practice of States and in the case law. Whether such persons would enjoy immunity *ratione materiae* or immunity deriving from special missions was viewed as not conclusive as to the exclusion of such persons from the draft article. It was pointed out that the extension of immunity *rationae personae* to other high-ranking officials was justified for the same representational and functional reasons given by the Commission for the troika; and any extension could be so as a matter of progressive development of international law. It was suggested that the matter could be revisited once the Commission completes work on immunity *ratione materiae*. Some other delegations also considered it useful, as an alternative approach, for the Commission to establish the necessary criteria.

24. Some delegations identified the need to address the question of members of family of persons enjoying immunity *ratione personae*, suggesting that they could be covered by immunity deriving from special missions.

25. With regard to the question of possible exceptions to immunity *ratione personae*, some delegations recalled that such immunity was status-based; accordingly, it would be important not to render its principal aim meaningless by introducing exceptions that could not be justified or whose implications might entail difficulties in implementation. To this end, some delegations observed that there were no grounds in international law for concluding that there existed any exceptions to immunity *ratione personae*.

26. Some other delegations underlined that the question of whether or not there were exceptions to immunity, in particular in respect of serious crimes, should depend on an in-depth analysis of State practice. It was underscored that, as a general matter, where combating impunity for the most serious crimes of concern to the international community as a whole was at issue, no State official should be shielded by rules of immunity, by turning them into rules of impunity. For some, international law was developing to exclude immunity *ratione materiae* for State officials suspected of international crimes committed in the course of their duties, while for others, it was reasonable that crimes such as genocide, crimes against humanity and serious war crimes should not be included in any definition of acts covered by immunity. It was argued that such acts were *ab initio* not subject to any consideration of immunity, rendering irrelevant any purported cover of officialdom.

27. While some delegations noted that immunity *ratione personae* was not enjoyed as a function of one's nationality, some other delegations urged the Commission to reconsider the relevance of nationality as a factor, given that in some other immunity regimes it was considered relevant.

28. Some delegations underscored that immunity *ratione personae* applies during both official and private visits. It was also considered useful to clarify in the commentary that those enjoying immunity *ratione personae* for the purposes of the draft articles could not be compelled to testify even in criminal cases in which they were not the defendants.

4. Draft article 4. Scope of immunity *ratione personae*

29. It was noted that the draft article reflected the state of the law on the temporal scope of immunity *ratione personae*. Some delegations, however, pointed out the need to reconsider paragraph 2, in the light of possible exceptions, with respect, in particular, to serious crimes of international concern. Even though immunity *ratione materiae* would be considered at a later stage, some delegations considered it appropriate to have an understanding of what was meant by "official acts".

30. It was also suggested that it might be useful for the purposes of the commentary to address the position of heirs to the monarch, heads of State-elect, as well as the conditions regarding the assumption, temporary or otherwise, of such office.

C. Protection of persons in the event of disasters

1. Draft article 5 bis. Forms of cooperation

31. Some delegations expressed support for the further clarification of draft article 5, contained in draft article 5 bis, while according to another view, draft article 5 bis was not necessary as it did not contain any normative substance.

Similarly, the view was maintained that the draft article could hardly be regarded as one creating legal obligations, as it was descriptive in nature. The suggestion was made that the forms of assistance offered to the affected State should be based on the State's request.

2. Draft article 5 ter. Cooperation for disaster risk reduction

32. Support was expressed for the inclusion of draft article 5 ter. The concern was expressed, however, that the correlation between "measures" and "appropriate measures" in draft article 16, when read together with the obligation to cooperate in draft article 5, could result in a greater role for international organizations than was the case in practice. It was suggested that besides taking the required measures intended to reduce the risk of the disasters themselves, it was also important that, in the pre-disaster phase, cooperation be extended to enhancing the resilience of the affected populations and communities to disasters. Other suggestions included: providing an express cross-reference to draft article 16, and indicating in the commentaries that cooperation may also include joint projects and programmes, cross-border planning, the development of methodologies and standards, capacity-building, the exchange of expertise and good practices and the exchange of risk analysis and information. Support was also expressed for the proposal to incorporate the draft article into draft article 5.

3. Draft article 12. Offers of assistance

33. While support was expressed for draft article 12, it was suggested that the Commission eliminate the distinction between States, the United Nations, and other competent intergovernmental organizations, on the one hand, and relevant non-governmental organizations, on the other, by indicating that they all "may" offer assistance to the affected States. Others supported draft article 12 precisely because it drew such distinctions, so as to avoid the interpretation that non-governmental organizations are endowed with international legal personality. According to another view, the draft article was unnecessary, as it stated the obvious.

4. Draft article 13. Conditions on the provision of external assistance

34. It was reiterated that the conditions under which assistance may be provided should not be the result of the unilateral decision of the affected State, but should be based on consultations between it and the assisting actors. In a similar vein, it was proposed that the provision be further refined so as to place greater emphasis on cooperation between the affected State and assisting entities. It was also suggested that the same limitation on formulating conditions be imposed on the States that provide assistance. It was also proposed that a reference be made to the special needs of women and of especially vulnerable or disadvantaged groups.

5. Draft article 14. Facilitation of external assistance

35. It was suggested that reference also be made to measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. A preference was also expressed for excluding the reference to "privileges and immunities" in paragraph 1 (a).

According to a further suggestion, the words "where applicable" could be inserted to indicate that such privileges were not always available.

6. Draft article 15. Termination of external assistance

36. The suggestion was made that it be clarified that the termination of assistance should not be done at the expense of the needs of the affected persons, especially when the termination was requested by the affected State. Further clarification was also sought regarding the extent of the requirement to consult, in particular on whether termination required agreement among the relevant actors, and with respect to the modalities of such termination. It was further proposed that the draft article expressly confirm that the affected State retains control over the duration for which the assistance is provided.

7. Article 16. Duty to reduce the risk of disasters

37. While support was expressed for draft article 16, the view was voiced that the question of disaster prevention should not distract the Commission from post-disaster assistance. Other delegations were of the view that disaster risk reduction was such a vital question that draft article 16 was best located among the initial articles. The view was expressed that the duty to reduce the risk of disasters was based on the contemporary understanding of State sovereignty, encompassing not only rights, but also the duties of States towards their citizens. The duty also accorded with the obligation of States to respect, protect, and fulfil human rights, in particular the right to life.

38. The point was made that it was also necessary to observe the principle of due diligence, which was well-established in international law. It was also suggested that the commentary to draft article 16 should clarify that a State's duty to prevent disasters includes the duty to take necessary and appropriate measures to ensure that its actions do not increase the risk of disaster in other States. According to a further suggestion, the distinction between natural and industrial disasters was particularly relevant in the context of risk reduction, and worth drawing in the draft articles.

39. Concerning paragraph 1, support was expressed for the reference to the existence of a legal obligation to take measures. On the other hand, the existence of such a "duty", as also indicated in the title of the draft article, was disputed. The view was expressed that if States were under a positive obligation, it was one of means and not of result. Furthermore, it was observed that the widespread State practice, recorded in the report of the Special Rapporteur (A/CN.4/662), was not undertaken out of a sense of legal obligation. It was suggested that the Commission delve deeper into when such a "duty" to reduce risk would arise for States, by undertaking an analysis of the concept of "risk", as was done in its prior work on the prevention of transboundary harm from hazardous activities. According to another view, the article simply acknowledged the fact that many States accept an obligation to reduce the risk of disasters, which was evident from various multilateral, regional and bilateral agreements and national legal frameworks.

40. It was noted that account had to be taken of the fact that not all States have the capacity or resources to take "necessary and appropriate" measures. Other delegations were less concerned, since the concept of "necessary and appropriate" took into account differences in capacity. The emphasis on taking measures involving the internal legal frameworks of States was welcomed. Others were of the

view that legislation was not enough: there was also a need for effective practical measures to reduce the risk and consequences of disaster. It was also suggested that the words "in particular" be inserted so as to allow for greater discretion. Suggestions for improvement included: making a reference to ensuring that the appropriate and "systematic" measures are taken; and making the "effective" implementation of legislation an express requirement.

41. As regards paragraph 2, it was recalled that the list of three categories of measures was not meant to be exhaustive, but served as an example of a wide range of practical measures that should be undertaken by public and private sector actors, given that such measures would vary by disaster. It was also proposed that the reference to the dissemination of risk and past loss information should not be absolute and ought to be guided by each State's existing laws, rules, regulations and national policies. Further suggestions included making specific reference: to multi-hazard assessments, including the identification of vulnerable people or communities, and the pertinent infrastructure, in relation to the relevant hazards; to practical pre-emptive measures that assist people or communities in reducing their exposure and enhancing their resilience; and to assessing and reducing the vulnerability of communities faced with natural hazards.

D. Formation and evidence of customary international law

1. General comments

42. Several delegations supported the change of the topic to "Identification of customary international law", with a number of delegations also agreeing that, despite the change, the Commission should continue its consideration of both the formation and evidence of customary international law.

2. Methodology, scope and range of materials to be consulted

43. As to methodology, delegations generally welcomed the "two-element" approach, though several delegations stressed the need to address the relative weight accorded to State practice and *opinio juris*, as well as their temporal aspects. While a number of delegations expressed support for a common, unified approach to the identification of customary international law, several delegations were also of the view that the question of a differentiated approach to identification in different areas of international law ought to be examined.

44. Regarding scope, some delegations welcomed the proposal to exclude a detailed study of *jus cogens*, while other delegations considered that *jus cogens* was closely linked to customary international law and thus merited study. Delegations also generally welcomed the Commission's plan to consider the relationship between customary international law and other sources of international law. According to another view, with the exception of treaty law, the relationship with other sources should be studied as part of a separate topic on the hierarchy of sources. A number of delegations also encouraged the consideration of the relationship between customary international law and regional customary international law. Lastly, support was expressed for the study of "bilateral custom", as well as the relationship between non-binding norms and the formation of rules of customary international law.

45. Concerning the range of materials to be considered, a number of delegations encouraged the study of State practice from all regions of the world and reiterated that State practice remained essential to the topic; several delegations acknowledged, however, that very few States systematically compile and publish their practice. Certain delegations urged the Commission to proceed cautiously in its analysis of State practice, particularly with respect to decisions of domestic courts.

46. Decisions of international and regional courts were also discussed, with some delegations welcoming their consideration and some others indicating that such decisions should be approached with caution. A number of delegations also supported the proposal to consider the role of the practice of international organizations — drawing particular attention to the potential relevance of resolutions of the General Assembly and statements of delegations — whereas other delegations again urged caution. Some delegations were of the view that the relevance, if any, of non-State actors and the International Committee of the Red Cross should be carefully considered.

3. Final form

47. As to the outcome of the Commission's work on the topic, several delegations welcomed the proposed elaboration of conclusions with commentaries, with certain delegations observing that such an outcome could be of practical value for judges and practitioners. The formulation of a set of guidelines was also proposed, while several other delegations were of the view that the final outcome should be considered at a more advanced stage of the work. Some delegations also supported the emphasis on terminological clarity and the development of a glossary of terms. Irrespective of the outcome, several delegations again urged the Commission to not be overly prescriptive in its work, noting that the flexibility of customary international law must be preserved.

E. Provisional application of treaties

48. There existed broad agreement that the primary aim of the Commission's task should be to examine the mechanism of provisional application of treaties and its legal effects. Specific suggestions included considering: the legal consequences arising from a State's failure to comply with the provisions of a treaty that it has agreed to apply provisionally; the provisional establishment of bodies created by a treaty; the possibility of provisional accession; the existence of limitations on the duration of provisional application; the possibility that some types of treaties, such as those establishing the rights of individuals, cannot be the subject of provisional application; the customary law character of provisional application; whether provisional application applies to the entire treaty or not; the activation and termination of provisional application, including whether unilateral declarations are sufficient for such purposes; and the relationship of article 25 with other provisions of the Vienna Convention on the Law of Treaties.

49. It was also suggested that the Commission analyse the various models of provisional application, since it might be found that provisional application from the date of signature raised questions different from, and additional to, provisional application from the date of ratification. It was likewise suggested that provisionally applied treaties be distinguished from interim agreements, and that the Commission

also consider provisional application by means of separate agreements, including when the treaty being provisionally applied does not itself provide for such possibility. Support was also expressed for including within the scope of the topic a consideration of the provisional application of treaties by international organizations. It was also suggested that a distinction be drawn between provisional application in the context of multilateral as opposed to bilateral treaties.

50. It was reiterated that the key consequence of provisional application is that the application of provisions during the period of provisional application can be more easily terminated than once the treaty has entered into force. Support was also expressed for the proposition that the breach of obligations arising from the provisional application of a treaty would engage the international responsibility of the State concerned. At the same time, it was pointed out that it would not be necessary to consider the question of the consequences of such wrongful acts, as they would be the same as those already covered by the articles on the responsibility of States for internationally wrongful acts, of 2001. According to another view, it should be left to States to determine the legal consequences of such recourse on a case-by-case basis.

51. Agreement was expressed with the view that provisional application was not to be encouraged or discouraged, but should instead be understood as a legal concept with its accompanying international consequences. Specific significance was attached to the need to retain flexibility in the regime on provisional application of treaties.

52. It was generally agreed that the Commission should focus on the international dimension of provisional application, since the decision whether to provisionally apply a treaty was a constitutional and policy matter for States. Nonetheless, it was suggested that the Commission take a decision as to whether to expressly exclude the internal legal aspect *in toto*, or whether to include some analysis of the internal position, for example, in relation to "limitation clauses" in treaties whereby provisional application is conditional upon being in accordance with internal or constitutional law.

53. For several delegations, it was still too premature to consider the possible outcome of the work on the topic. Some preliminary suggestions included preparing a guide with commentaries and model clauses, or simply a set of guidelines.

F. Protection of the environment in relation to armed conflicts

54. Several delegations welcomed the inclusion of the topic in the programme of work of the Commission. While some delegations considered the time ripe for developing this area of law, some doubt was also expressed concerning the feasibility of advancing work in this domain. It was pointed out that the topic encompassed broad and potentially controversial issues that could have far-reaching ramifications, and attention was particularly drawn to the question of the concurrent application of different bodies of law during armed conflict. The view was also expressed that the question of the protection of the environment in relation to armed conflict was sufficiently regulated under international humanitarian law and that, in time of peace, general rules relating to the environment applied.

55. Certain delegations drew attention to the relevance of various legal regimes when considering the topic. The importance of providing a holistic assessment of the various bodies of law in order to provide an analysis of the pertinent rules and to identify possible gaps was therefore underlined. In this regard, it was pointed out that it would be paramount to assess whether damage to the environment during an armed conflict resulted from a lack of clear obligations to protect the environment, a lack of effective implementation, or a combination of both. It was further suggested that the Commission determine whether international environmental law treaties continued to apply in situations of armed conflict.

56. Several delegations acknowledged the intention of the Special Rapporteur to consider the topic in three temporal phases (before, during and after armed conflict). It was stressed, however, that such distinction should be for analytical purposes only; the topic was highly complex and it would be difficult to draw strict lines between the phases. While some delegations welcomed the decision of the Special Rapporteur to focus on phases I and III, it was also argued that phase II merited most attention. According to another view, instead of adopting a temporal phased approach, it would be meaningful to examine the interrelationship between the relevant bodies of law implicated by the topic.

57. Regarding phase I, it was understood that the question of the protection of the environment as such would only be addressed insofar as the possibility of a military conflict required special measures of protection. It was also suggested that the meaning of "obligations of relevance to a potential armed conflict" required further clarification, whether the Commission intended to develop new obligations or only to draw up a set of guidelines. Concerning phase II, some delegations drew attention to the legal regimes already applicable during armed conflict. It was stressed that the Commission should not attempt to modify existing obligations. Therefore, the decision of the Special Rapporteur to focus on identifying existing rules and principles of the law of armed conflict related to the protection of the environment was welcomed. It was also observed that this phase nevertheless raised some important issues that would benefit from further consideration. While certain delegations welcomed the decision by the Special Rapporteur not to address the effects of certain weapons on the environment, some other delegations considered that this aspect of the topic merited attention. Support was expressed for the inclusion of non-international armed conflicts in phase II and clarification was sought as to whether riots and internal disturbances would also be considered. With regard to phase III, the view was expressed that questions on responsibility or accountability, and concerning reparation or damages for harm caused, should be addressed. It was also suggested that the Commission should focus in particular on measures to rehabilitate the environment, as well as address the question of demining.

58. A number of delegations agreed with the Special Rapporteur that the topic was more suited to the elaboration of guidelines than to a binding legal regime. While some delegations cautioned against elaborating a convention in this area, the view was expressed that the development of draft articles might be appropriate. Certain other delegations pointed out that they would not exclude the possibility of progressively developing this area of the law. It was also suggested that the development of best practices may constitute a useful basis for further work and that a handbook reflecting existing basic norms in the relevant fields of law as well as elements signifying a possible evolution of State practice be contemplated. Some

delegations observed, however, that it was premature to pronounce on the final outcome at that point. Indeed, according to one view, it was neither desirable nor achievable to draw up guidelines or reach conclusions on the subject at that stage.

G. Obligation to extradite or prosecute (*aut dedere aut judicare*)

59. Some delegations emphasized the continued relevance of the topic in the prevention of impunity and acknowledged the report of the Working Group and its analysis of the judgment of the International Court of Justice in the *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)* case. Some other delegations questioned, however, whether any broad implications could be derived from the specific circumstances presented in the judgment.

60. The decision by the Working Group not to assess the customary nature of the obligation was welcomed by some delegations who reiterated their position that there was no obligation to extradite or prosecute under customary international law. In their view, the obligation resulted from specific treaty provisions. Some other delegations were of the view that the question merited further consideration and it was suggested that a review of State practice be undertaken for the purpose.

61. A number of delegations agreed with the Working Group that it would be futile to attempt to harmonize treaty provisions containing the obligation to extradite or prosecute in the light of their diversity. Indeed, it was argued that any attempt at assessing the application or interpretation of the obligation may be fruitless for the development of the topic in the light of the specific context in which the obligation would be implemented. It was suggested, however, that some common features between the treaty provisions may be identified. It was also proposed that the Commission address gaps in existing treaty regimes and, according to one view, the Commission should limit any future work to this aspect of the topic. The view was further expressed that, in the light of the judgment in *Belgium v. Senegal*, the Commission should analyse the question of the relative weight of the obligation to prosecute and the obligation to extradite in greater depth, as well as the procedural aspects surrounding the obligation to prosecute.

62. Some delegations were of the view that the issue of surrendering accused persons to international tribunals as a means of implementing the obligation merited further consideration by the Commission. The point was also made, however, that the question should not be dealt with since specific rules already governed that area of law.

63. While a number of delegations considered that work on the topic should include some aspect of universal jurisdiction, other delegations pointed to the distinct nature of these concepts. It was further stressed that the concept of peremptory norms should be treated with great caution.

64. Regarding the outcome of the work of the Commission, it was emphasized that the Commission should seek to adopt concrete results on the topic. In this context, it was nevertheless stressed that it would be premature to elaborate draft articles prior to ascertaining the status of existing law concerning the basis of the obligation. While it was suggested that the Commission elaborate model provisions of the obligation in order to close gaps in conventional practice, it was also argued that such an exercise would not be opportune. Another proposal consisted in the

Commission elaborating commentaries to assist in the implementation of the obligation. However, some doubt was expressed as to the possibility of advancing work on the topic any further in the light of its lack of clarity and the difficulties encountered in systemizing it in any useful manner. Indeed, the usefulness of continuing with the topic was questioned if the Commission decided to include the topic "Crimes against humanity" in its programme of work. Certain delegations noted the lack of concrete progress on the topic and suggested that work be concluded; the report of the Working Group was considered to be a satisfactory final result.

H. Most-favoured-nation clause

65. Delegations expressed their appreciation for the extensive work and analysis undertaken by the Study Group to date. It was considered that the work of the Study Group would be a valuable contribution to clarifying aspects of international economic law that had led to conflicting interpretations, in particular, in the area of international investment law, with respect to situations where: (a) a provision extended the most-favoured-nation clause to the dispute resolution system; (b) a provision excluded such extension; or (c) a provision was silent on the matter. Delegations underlined the importance of the interpretative tools provided for by the Vienna Conventions.

66. Some delegations highlighted the significance that they attached to the principle of consent between parties negotiating bilateral investment treaties as regards the scope and coverage of most-favoured-nation clauses, noting that in interpreting a treaty where the ambit of the most-favoured-nation obligation with respect to dispute settlement was not specified, it was not appropriate to presume that such obligations applied broadly in a manner that would negate the negotiated procedural requirements. The point was also made that the recommendations of the Study Group should address this aspect, as this might help in improving the balance between the legitimate interests of both the investor and the host State.

67. On the question of other areas suggested by the Study Group for consideration, some delegations stressed the need for some comparative analysis of the operation of the most-favoured-nation clause in other areas, such as in headquarters agreements; in State procurement, including with regard to the General Agreement on Tariffs and Trade and World Trade Organization rules; in relation to trade in services under the General Agreement on Trade in Services and investment agreements; the correlation between the most-favoured-nation regime, national treatment and minimum international standards on the treatment of aliens, as well as fair and equitable treatment; and the effect of reciprocity in the context of the regime.

68. Some delegations expressed the hope that the Study Group would undertake further work examining whether "less favourable treatment" could be defined with greater clarity in the context of investment treaties (in particular, whether the most-favoured-nation principle requires treatment on exactly the same terms and conditions as it was extended to investors and investments of the treaty party, or substantively the same treatment).

69. On the final form, some delegations expressed support for the orientation of the Study Group not to revise the 1978 draft articles on the most-favoured-nation clauses or to prepare a set of new draft articles. It was also recalled that most-

favoured-nation provisions were a product of specific treaty formation and tended to differ considerably in their structure, scope, and language, and were dependent on other provisions in the specific agreements in which they were located, and thus did not lend themselves to a uniform approach. To serve as a useful resource tool for Governments and practitioners, it was suggested instead that the focus of the Study Group should be to present a report that would describe and analyse contemporary jurisprudence on questions related to the scope of most-favoured-nation clauses in the context of dispute resolution. The Study Group was cautioned against an excessively prescriptive outcome. The view was also expressed doubting the desirability of having model clauses. Some delegations nevertheless supported the possibility of developing guidelines and model clauses. It was suggested that, as an alternative, it could be useful to simply catalogue the examples of clauses contained in relevant treaties and call the attention of States to the interpretation given to them by various arbitral awards. There was support for the approach of the Study Group to address the whole subject against the background of general international law. It was confirmed that the overall aim should be to safeguard against the fragmentation of international law, to provide greater coherence in the approaches in investment arbitration, and to assure greater certainty and stability in the area of investment law.

I. Other decisions and conclusions of the Commission

1. Inclusion of new topics

70. A number of delegations welcomed, and several others noted, the inclusion of the topic "Protection of the atmosphere" in the programme of work of the Commission. Some delegations also welcomed, and others acknowledged, the limitations on the scope of the topic agreed upon by the Commission, although certain delegations questioned whether, given the limitations, it would be useful to proceed with its consideration. Several delegations were of the view that the inclusion of the topic was not advisable in the light of existing treaty regimes on the subject. Some delegations also considered that the topic did not meet the criteria for the selection of new topics. According to certain delegations, the agreed limitations did not alleviate their concerns regarding the development of the topic, and a number of delegations maintained that the topic should not impede on political negotiations on related issues elsewhere. Regarding the outcome of work, some delegations agreed that the topic was more suited for draft guidelines than for legally binding norms.

71. Several delegations welcomed, and several others took note of, the inclusion of the topic "Protection of the environment in relation to armed conflicts" in the programme of work of the Commission. The view was expressed that the topic was a natural continuation of the Commission's work on the effects of armed conflicts on treaties and fragmentation of international law. Concern was also reiterated, however, regarding the feasibility of work on the topic, as well as its objective.

72. Several delegations welcomed, and several others took note of, the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work. Certain delegations indicated that the topic met the Commission's standards for topic selection, while some others considered that it did not. Several delegations drew attention to the topic's relationship with existing legal instruments, including the Rome Statute of the International Criminal Court; questions were also raised

regarding how the topic would relate to existing norms of customary international law. Several delegations suggested that any work on the topic should complement rather than overlap with existing legal regimes. Work on the topic, several delegations noted, could address aspects not covered by the Rome Statute, including a general framework for inter-State cooperation and a State duty to prevent crimes against humanity. Several other delegations doubted the utility of proceeding with the topic as proposed, with certain delegations indicating that work on ensuring the universality of the Rome Statute and strengthening mutual legal cooperation would be preferable. A number of delegations, however, were of the view that the Commission should continue its consideration and discussion of the topic, although it was stressed that the Commission should be careful to avoid any predetermined results, and that any outcome would require further study.

73. Concerning the selection of topics by the Commission, some delegations suggested that the Commission should consider the views of Member States when deciding on the inclusion of new topics in its programme of work. The Commission was encouraged to prioritize topics that would provide practical guidance to the international community rather than highly academic or technical topics. It was also noted that the Commission continued to identify new topics suitable for inclusion in its programme of work, which, it was suggested, demonstrated that there were still many avenues of international law to be explored. According to another view, the Commission's workload gave rise to concerns and vigilance was required to ensure that its long-term programme of work was not overburdened to little purpose. Topics such as *jus cogens* and the relationship between codification and progressive development were mentioned for inclusion in the long-term programme of work.

74. Delegations also suggested that additional topics be considered for inclusion in the programme of work of the Commission, with support being expressed for the inclusion of "Jurisdictional immunity of international organizations" and the "Protection of personal data in transborder flow of information".

2. Relations with the Sixth Committee

75. Regarding the procedures and working methods of the Commission, a number of delegations suggested that there was a need for more engagement between the Commission and the Sixth Committee. In this regard, several delegations reiterated their position that sessions of the Commission should be held in New York at least once every five years. A number of delegations also noted that it was regrettable that, owing to budgetary constraints, it was not possible for all special rapporteurs to attend discussions in the Sixth Committee. The Commission was also encouraged to improve its efficiency and to strengthen its cooperation with other bodies in the area of international law.

76. A number of delegations acknowledged the support to the Commission provided by the Codification Division of the Office of Legal Affairs. Several delegations indicated that it was unacceptable that periodic publications of the Codification Division might be placed at risk for financial reasons. Those delegations also welcomed the dissemination work of the Codification Division and the Division of Conference Management of the United Nations Office at Geneva, as well as the voluntary contributions made to the trust fund for the elimination of the backlog in the publication of the *Yearbook of the International Law Commission*.

III. Topical summary: report of the International Law Commission the work of its sixty-third session

A. Guide to Practice on Reservations to Treaties

77. Delegations welcomed the adoption by the Commission of the Guide to Practice on Reservations to Treaties, including the introduction, the guidelines and their commentaries; many also emphasized its practical value. In particular, it was noted that the Guide was not intended to replace or amend the 1969, 1978 and 1986 Vienna Conventions, but rather to provide assistance and possible solutions to practitioners of international law in addressing difficult issues relating to reservations. For some delegations, the Guide was generally well balanced and reflected the progressive development of international law. Other delegations, however, considered that the Guide did not always reflect State practice or settled consensus. It was also requested that the Guide be streamlined, as it did not remove all uncertainties regarding reservations and sometimes created additional difficulties.

78. Various views were expressed regarding the overall approach of the Guide to the question of the validity of reservations. This approach was supported by some delegations, who considered that it facilitated the assessment of the validity of reservations to treaties by specifying the conditions of formal validity and permissibility. Nevertheless, a number of delegations raised some concerns in that regard, noting, in particular, that the Guide was not reflective of the existing law and could not be regarded as having attained a desirable result on that question. The view was expressed that the only consequence of an invalid reservation was that treaty relations would not arise between the reserving and objecting States. It was also observed that reservations in the area of human rights should not be accepted as valid. Some delegations also stated their opposition to the assessment of the validity of a reservation, with a legally binding effect, by a treaty monitoring organ. The provision according to which the author of an invalid reservation could express at any time its intention not to be bound by the treaty without the benefit of the reservation was criticized by some delegations. It was also suggested that the term "reservations" should not be used for both valid and non-valid reservations, and that, since it was for individual States to assess the scope of their treaty relations, the question would thus be more properly characterized as a matter of opposability rather than validity.

79. Some delegations emphasized the importance of the distinction between reservations and interpretative declarations. For other delegations, introducing detailed guidelines on these declarations would create problems of application and may affect their usefulness. It was also noted that, since interpretative declarations do not have any legal effect, the necessity of guidelines regulating them was doubtful.

80. While some delegations welcomed the approach of the Guide with respect to the late formulation of reservations, others expressed concerns on that matter, stressing that the Guide did not reflect customary law and that such reservations were not envisaged by the Vienna Conventions. Requests were made for a clarification regarding the legal effects of the late formulation of reservations or objections.

81. On the question of reservations relating to the territorial application of a treaty, some delegations appreciated the approach taken by the Commission in its

commentaries to the Guide, which supported the view that a declaration that excluded the application of a treaty as a whole to a particular territory was not a reservation in the sense of the Vienna Convention. Some other delegations expressed disagreement with the approach.

82. It was also suggested that references in the Guide to international organizations were inappropriate as their power to conclude treaties depended largely on the terms of the international organization's constituent instrument and that a separate legal regime for international organizations should be developed.

83. A number of delegations made additional substantive comments on specific guidelines.

84. Delegations supported the recommendation of the Commission that the General Assembly ensure the widest possible dissemination of the Guide.

B. Reservations dialogue

85. Some delegations welcomed the reservations dialogue called for by the Commission, emphasizing its potential key role in avoiding the formulation of reservations incompatible with international law. The view was expressed that such a dialogue should be left to the States parties themselves and the necessity and feasibility of creating new mechanisms was questioned. The view was expressed that it was preferable for practice to develop around the Guide on that matter before the establishment of a mechanism was considered. While noting that the recommendations of the Commission on a reservations dialogue needed thorough study, a suggestion was made to give depositaries, the United Nations Secretariat in particular, a more important role in this context. It was also suggested that the reservations dialogue should not be used to pressure States that wished to enter reservations. Lastly, it was stressed that such a dialogue should not impair the inherent flexibility of the existing system.

86. Some delegations considered that the establishment of an "observatory" on treaty reservations within the Sixth Committee might be very useful, and supported the recommendation to call for the establishment of similar mechanisms at the regional level. It was suggested that the Secretariat should play a primary role in the implementation of such a mechanism and that its establishment could be acceptable if it were fulfilling the needs of States in the framework of the Vienna Conventions and if it was not a compulsory procedure. Another viewpoint stressed the need for further reflection on the proposed "observatory". Some other delegations, however, expressed concerns as to its establishment, arguing that the mechanism existing within the European regional organization was not suitable for transposition to the universal level. A suggestion was made to proceed first on an experimental basis before formally creating a mechanism. Comments were made regarding the work of the Committee of Legal Advisers on Public International Law of the European Council as the European Observatory of Reservations to International Treaties.

87. Some delegations welcomed the suggestion to create a reservations assistance mechanism, although they noted that the operation of such a mechanism needed to be elaborated further. It was pointed out that the function of such a mechanism should be limited to offering technical assistance to States in formulating reservations or objections. Several delegations raised doubts as to the propriety of

injecting such an independent mechanism into a process that was fundamentally between and among States. It was added that the existing mechanisms already provided for a framework for exchanging views and settling disputes, and that States were free to establish such mechanisms in the context of specific treaties. Some delegations also suggested that States were not obligated to accept reservations and that there was thus no need for a mechanism to settle differences of views on such matters. Finally, the view was expressed that the proposals resulting from such a mechanism might be seen as compulsory for States requesting assistance.